3-6-2012

Citizens Against Range Expansion v. Idaho Fish and Game Dept Appellant's Brief Dckt. 39297

No. 39297-2011

IN THE SUPREME COURT OF THE STATE OF IDAHO

CITIZENS AGAINST RANGE EXPANSION, an unincorporated non-profit Association; JEANNE J. HOM, a single woman; EUGENE and KATHLEEN RILEY, husband and wife; LAMBERT and DENISE RILEY, husband and wife; GABRIELLE GROTH-MARNAT, a single woman, GERALD PRICE, a single man; RONALD and DOROTHY ELDRIDGE, husband and wife; GLENN and LUCY CHAPIN, husband and wife; SHERYL PUCKETT, a single woman; CHARLES and CYNTHIA MURRAY, husband and wife; and DAVE VIG, a single man,

Plaintiffs/Respondents,

v.

IDAHO DEPARTMENT OF FISH AND GAME, an agency of the STATE OF IDAHO, and VIRGIL MOORE, Director of the IDAHO DEPARTMENT OF FISH AND GAME,

Defendants/Appellants.

APPELLANTS' BRIEF

Appeal from the District Court of the First Judicial District

of the State of Idaho, in and for Kootenai County.

Honorable, John T. Mitchell, District Judge presiding.

LAWRENCE G. WASDEN
Attorney General
Clive J. Strong
Chief, Natural Resources Division
Kathleen E. Trever - ISB # 4862
Deputy Attorney General
P.O. Box 25
Boise, Idaho 83707
Telephone: 208-287-2710
Facsimile: 208-334-4885
Email: Kathleen.Trever@idfg.idaho.gov

Attorneys for Appellants

Scott W. Reed
Attorney at Law
P.O. Box A
Coeur d'Alene, ID 83816
208-664-2161

Harvey Richman
Attorney at Law
19643 N. Perimeter Road
Athol, ID 83801
208-683-2732

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

STATUTES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

I. STATEMENT OF THE CASE

A. Statement of the Case

The Idaho Department of Fish and Game and Director Moore (collectively "IDFG") hereby appeal the district court's denial of their June 9, 2010 post-judgment motion to partially lift an injunction in a nuisance action that had closed the historic Farragut Shooting Range. The injunction required IDFG to make certain safety improvements to reopen the Range for up to 500 shooters per year, and to make additional safety improvements and noise abatement measures to open the Range to over 500 shooters per year.

IDFG based its motion on improvements made to a portion of the Range to comply with the injunction's stated condition to reopen the Range for up to 500 shooters per year. IDFG also based its motion on additional improvements made to comply with the injunction's more stringent conditions to reopen the Range for more than 500 shooters, and on post-judgment action by the Idaho Legislature to adopt noise and other standards for state outdoor sport shooting ranges. The district court summarily denied IDFG's request to reopen the Range for more than 500 shooters, concluding the statutory standards for state outdoor sport shooting ranges violated the Idaho Constitution's prohibition on certain types of "special legislation" and separation of judicial and legislative powers. As a result of this denial, the district court did not address the specific merits of IDFG's compliance with safety measures to exceed 500 shooters.

The district court concluded IDFG had complied with a reasonable interpretation of the safety requirement to lift the injunction for up to 500 shooters; nevertheless, it denied IDFG's motion to reopen the Range to up to 500 shooters after concluding IDFG should install certain

additional features to address safety issues "implicit" in the Judgment or "overlooked" by the parties and the court in the pre-Judgment proceedings.

B. Statement of Facts

The Farragut Shooting Range, near the unincorporated town of Bayview in Kootenai County, has been used as a shooting range since the U.S. Navy established it as part of the World War II Farragut Naval Training Center in 1942. AR 82, 234. IDFG acquired ownership of the Range after the War (*id.*), and use of the Range continued at levels that were disputed in these proceedings. In 2007, the Range had a berm behind the target area (also called a backstop) (*see Exh.* PPP), but did not have any safety baffles or side berms. *See* AR 239, Find. of Fact ¶22.

After the district court enjoined operation of the Range because of safety and noise concerns, IDFG chose not to appeal the Judgment, and proceeded to make Range improvements to comply with the terms of the injunction. IDFG renovated a portion of the Range for a 100-yard shooting area, with shooting only allowed from 12 designated shooting positions in a 6' by 72' area covered by a three-sided shooting shed. AR 947, Find. of Fact ¶¶10-11; Exh. MMM, NNN, PPP. To meet the condition to reopen this area for up to 500 shooters, IDFG installed safety baffles to cover each of the 12 shooting positions to prevent shooters (from prone to standing) from firing their weapons above the shooting area's back berm. *See* AR 949, Find. of Fact ¶23. To meet the conditions to reopen this portion of the Range to more than 500 shooters per year, IDFG installed a series of overhead and side baffles, side berms, and a shooting shed (*see* AR 948-49 Find. of Fact ¶¶13-23, Exh. PPP) to prevent a shooter from seeing "Blue Sky" downrange to prevent bullet escapement from the property owned and controlled by IDFG.

IDFG took these and other measures to meet and surpass the injunction's safety conditions, and to comply with noise and other standards adopted by the Idaho Legislature in 2008 in the Idaho Outdoor Sport Shooting Act, applicable to the Range.

C. Course of Proceedings

This action began on August 22, 2005, when Plaintiffs Citizens against Range Expansion *et al.* ("CARE") filed a complaint asserting nuisance and other causes of action and seeking injunctive and other relief regarding IDFG's operation of the Range. AR 14-33. CARE alleged a substantial change in Range use and sought to enjoin IDFG's continued use of the Range and implementation of a proposed Master Plan for renovating the Range. *See* AR 47-63.

Following discovery, summary judgment proceedings, and a trial December 11-14, 2006, the district court issued a Memorandum Decision, Findings of Fact, Conclusions of Law and Order on February 23, 2007 (AR 220-279) and a Judgment on March 2, 2007 (AR 280-283). In its 2007 Memorandum Decision, the district court determined the Range was, "[e]xcept for the fact that the existing range contains no baffle," relatively safe for what the court concluded was the annual use in 2002, based on incomplete usage records, of "perhaps up to 250 shooters ...." AR 265-66, Concl. of Law ¶7. The district court also determined that Range operations for up to 500 shooters per year were "not likely to be a nuisance." AR 266-67, Concl. of Law ¶7. Nevertheless, the district court concluded the current operation of the Range allowed bullet escapement beyond agency-controlled boundaries "into the Surface Danger Zone encompassing plaintiffs' private property and Farragut State Park property open to members of the public, constitut[ing] a clear and present danger to the safety and health of plaintiffs and other persons in

the area." AR 265, Concl. of Law ¶6; *see* AR 247, Find. of Fact ¶¶36-40; *see also* Exh. 2 at 2, 9 (fig. 2); Exh. 32 (depicting Surface Danger Zone for the unbaffled Farragut Range).

In its Judgment, the district court granted injunctive relief requiring IDFG to close the Farragut Shooting Range "until a baffle is installed over every firing position." AR 281; *see also* AR 278. The district court required that the baffle "be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone), cannot fire his or her weapon above the berm behind the target." AR 281; *see also* AR 278. The sufficiency of baffles was to be established by agreement of the parties. AR 281. Absent agreement, the district court stated it would decide whether the baffles IDFG installed were sufficient to prevent the firing of weapons above the berm by viewing the premises itself. AR 281; *see also* AR 278. The district court ruled that "at such time as baffles are installed over every firing position and approved in the manner set forth, [IDFG] may operate the Farragut Shooting Range in the same manner in which it historically has (i.e., without any onsite supervision) for up to 500 shooters per year." AR 281-82; *see also* AR 278.

The district court concluded that if IDFG wished to exceed 500 shooters per year it must make further improvements "that will address safety and noise considerations." AR 267, Concl. of Law ¶7. The district court established two additional conditions for opening the Range to more than 500 shooters per year: "safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by [IDFG]" and "noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence." AR 282; *see also* AR 278-79. To

exceed 500 shooters per year, the district court specified in its February 23, 2007 Order that "[t]he first concern (safety) can be satisfied only by the 'No Blue Sky' rule, or 'totally baffled . . . so that a round cannot escape[,]' as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas." AR 278-79.

On June 9, 2010, IDFG filed a Motion for Partial Lifting of Injunction. AR 293-297. In its Motion, IDFG sought to open the renovated 100-yard shooting area for up to 500 shooters, based on compliance with the Judgment's condition to install a baffle over every shooting position. AR 294. IDFG also sought to open the 100-yard shooting area for more than 500 shooters, based on additional safety improvements that complied with either the "No Blue Sky Rule" or the baffle criteria espoused by Clark Vargas in Exh. 2 (with IDFG contending it met both the "No Blue Sky Rule" and Vargas criteria), and based on reliance on noise standards of the Idaho Outdoor Sport Shooting Range Act, Idaho Code § 67-9101 *et seq.*, enacted in 2008 to regulate state outdoor sport shooting ranges such as the Farragut Range. AR 294-95; *see* AR 906.

The district court held a status conference on August 30, 2010 (TR8-34) and issued a Scheduling Order on September 17, 2010, establishing a schedule for discovery and additional briefing for summary disposition of the matter, and providing for an evidentiary hearing if needed. *See* AR 8, 841. On December 28, 2010, Plaintiffs filed a Motion for Summary Judgment asserting that Idaho Code § 67-9102 is unconstitutional. *See* AR 9; AR 865-66. Because the parties disagreed regarding compliance with the district court's condition to reopen

the Range for up to 500 shooters annually, IDFG filed a separate Motion for Court View to ensure compliance with the terms of the Judgment. AR 808-10; *see also* AR 295.

Following summary disposition proceedings, the district court issued an interlocutory Memorandum Decision and Order on March 11, 2011. AR 835-911. The district court determined it was appropriate to consider a partial reopening of the range for the 100-yard shooting area. *See* AR 908; *see also* AR 954 Concl. of Law ¶5. The district court decided, however, any court view of the premises was not appropriate and denied IDFG's Motion for Court View, determining that "[a]ny future action which contemplated a view of the premises by the Court will have to be accomplished by trial." AR 856-59, 910. Thus, the district court modified *sua sponte* its 2007 Judgment, which had conditioned lifting of the injunction for up to 500 shooters on a court view of the premises if the parties could not agree that the Judgment's requirements for baffling of shooting positions had been met. AR 910; *see* AR 281. The district court also concluded the noise standards of the Idaho Outdoor Sport Shooting Range Act violated the "special law" prohibition of art. III § 19 and the separation of powers requirement of art. V § 13 of the Idaho Constitution. AR 910. The district court also concluded that issues of material fact remained in dispute as to range safety, both to allow IDFG to open the Range up to 500 shooters per year and to expand beyond 500 shooters per year. AR 910-11. However, "due solely to the finding that the Idaho Outdoor Sport Shooting Range Act is unconstitutional, due to failure to address noise considerations alone," the district court denied IDFG's motion to partially lift the injunction to open the Range for more than 500 shooters per year. AR 910-11.

The district court set a hearing to begin on June 13, 2011, limited to the taking of evidence on safety considerations for up to 500 shooters. AR 911; *see also* AR 953, Concl. of Law ¶1.

IDFG filed a motion for permission to appeal the district court's decision regarding the constitutionality of the Idaho Outdoor Sport Shooting Range Act on March 25, 2011. AR 927. On April 20, 2011, the district court denied this motion. AR 912-19, 927. This Court denied IDFG's motion for permission to appeal on May 26, 2011. AR 11, 927-28.

The district court conducted an evidentiary hearing on June 13-14, 2011. AR 928. On August 25, 2011, the district court denied IDFG's Motion for Partial Lifting of Injunction without further modifying its February 23, 2007 Order. AR 957. The district court found IDFG had installed baffles over all 12 shooting positions in the 100-yard shooting area sufficient to prevent shooters (prone to standing) from "directly" firing above the berm behind the target. AR 949, Find. of Fact ¶23. The district court also found that IDFG had installed a series of six overhead baffles over each shooting position, as well as additional side baffles, side berms, and other improvements. AR 947-49, Find. of Fact ¶¶13-23. However, the district court stated that its condition to prevent shooters from firing "above the berm behind the target" should be interpreted to encompass ricochets resulting from shooters firing "at, below, or in directions to the side of or away from the berm behind the target." AR 955, Concl. of Law ¶6.

The district court found that its prohibition on "firing" above the berm should be interpreted to include ricochets "[b]ecause the subject of ricochets were [sic] not discussed at the 2006 trial" and because the court interpreted the word "round," which was excluded from the Judgment but used in the underlying Order, to prohibit the firing of "a round above the berm," to

include "ricochets." AR 955, Concl. of Law ¶6; *see also* AR 985-986. The district court found the 100-yard shooting area violated the safety considerations it set forth in 2007 and that partial lifting of the injunction "should occur" after IDFG implemented "simple and relatively inexpensive" measures the court identified to contain ricochets: ground baffles in conjunction with overhead baffles and an eyebrow berm or bullet catcher near the top of the back berm to reduce ground ricochets caused by striking the floor of the range. AR 957, Concl. of Law ¶12.

On August 29, 2011, the district court awarded CARE its costs. *See* AR 973. CARE subsequently applied for attorney's fees (*see* AR 970), and IDFG objected and moved to disallow fees and costs (*see id.*). On November 14, 2011, the district court rescinded its award of costs and granted IDFG's motion to disallow fees and costs. AR 970-88. In support of this decision, the district court found IDFG had not acted unreasonably by not making safety improvements that were "implicit" in the 2007 Order, and by not addressing issues, including ricochets, that the district court concluded had been "overlooked" by the district court and the parties at the time of the granting of injunctive relief. AR 985-86.

II. ISSUES PRESENTED ON APPEAL

1. Did the district court err in finding a noise standard adopted by the Idaho Legislature for state outdoor sport shooting ranges to constitute legislative infringement on judicial power and a "special law" prohibited by the Idaho Constitution?

2. Did the district court err in interpreting its injunction for reopening the Farragut Shooting Range to 500 shooters per year so as to impose new conditions not specified in the original injunction?

III. ARGUMENT

The district court erred by: (1) finding legislatively adopted noise standards for outdoor state sport shooting ranges to be legislative infringement on judicial power and special legislation prohibited by the Idaho Constitution; and (2) interpreting the condition to reopen the Range to 500 shooters per year in a manner at odds with the requirements of I.R.C.P. 65(d) and 60(b) .

A. The district court erred in concluding noise and other standards adopted by the Idaho Legislature for state outdoor sport shooting ranges are unconstitutional.

The district court erred in denying IDFG's Motion to Partially Lift Injunction as it related to reopening the Range to more than 500 shooters per year by determining the 2008 Idaho Outdoor Sport Shooting Range Act, which established noise and other standards for state outdoor sport shooting ranges, is unconstitutional. The district court erred by concluding that the Act violates the separation of powers doctrine and Idaho Constitution's prohibition against certain enumerated classes of "special" legislation.

1. Standard of Review

This Court exercises free review of a statute's constitutionality. *Idaho Schools For Equal Educational Opportunity v. State*, 140 Idaho 586, 590, 97 P.3d 453, 457 (2004) ("*ISEEO IV*") (citation omitted). The statute must be "unconstitutional as a whole, without any valid application." *Id.* (quotation omitted). "[E]very presumption is in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Id.* (quotation omitted).

2. The district court's determination that enactment of the Idaho Outdoor Sport Shooting Range Act deprives judicial power or jurisdiction in violation of art. V § 13 of the Idaho Constitution is at odds with established precedent.

In its 2007 Memorandum Decision and Order, the district court recognized that noise standards are a proper subject of legislative power. It reviewed state and local noise standards that might apply to shooting ranges, and found that Idaho did not have applicable statewide noise standards. AR 243. In its Judgment, the district court did not establish a noise standard for Range operations in fashioning prospective equitable relief, leaving that to future negotiation between the parties or post-judgment evidentiary hearing. AR 282; *see also* AR 278-79, 867-69.

In 2008, the Idaho Legislature enacted the Idaho Outdoor Sport Shooting Range Act, Idaho Code § 67-9101 *et seq.*, which established prospective statewide noise standards for state outdoor sport shooting ranges and preempted local ordinances purporting to regulate the use and operation of such ranges. There is no dispute that Farragut and other state-owned shooting ranges are subject to the Act's requirements.

In reviewing this legislative action in its March 11, 2011 decision, the district court stated that the litigation over the Farragut Range had identified a need for a noise standard stemming from the proposed expansion of the Farragut Range (AR 902), and noted that nothing in its 2007 Order prohibited IDFG from seeking legislative enactment of a noise standard (AR 869). In this regard, the district court's order is consistent with well-settled doctrine regarding the separation of power between the judicial and legislative branches.

Nonetheless, the district court concluded the Idaho Legislature's enactment of the Idaho Outdoor Sport Shooting Range Act constitutes an unconstitutional deprivation of judicial power "rightly pertain[ing]" to the judicial department under art. V § 13 of the Idaho Constitution. In reaching this conclusion, the district court cited only the case of *ISEEO IV,* 140 Idaho 586, 97 P.3d 453, stating it has "similarities" with the present case. AR 903-4.

According to the district court, "[w]hile IDFG did not ask the Idaho Legislature to rewrite the Idaho Rules of Civil Procedure (as the Idaho Supreme Court found the legislature did in *ISSEO* [sic] *IV*), nothing in Article V, § 13 requires so egregious an act." AR 904. In analyzing art. V § 13, however, the district court failed to specify what power rightly pertaining to the judiciary was deprived by passage of the Idaho Outdoor Sport Shooting Range Act.

The district court's conclusion is a significant and unwarranted expansion of the holding of *ISEEO IV*. The *ISEEO IV* decision addressed legislation purporting to establish procedures for suits alleging failure of the Legislature's constitutional duty to establish a "uniform and thorough system of public, free, common schools," and requiring dismissal of any then-pending suit against the State if such procedures were not followed. *ISEEO IV*, 140 Idaho 586, 97 P.3d 453. The Court found such legislative action to violate the art. III § 19 prohibition on enactment of special laws "[r]egulating the practice of the courts of justice," since it was "designed only to affect one particular lawsuit" and "purports to make decisions regarding this litigation that only the district court can make." *ISEEO IV*, 140 Idaho at 592-93, 97 P.3d at 459-60. The Court went on to conclude that the Legislature's enactment of procedural rules specific to the then-pending lawsuit was not within the authority granted the Legislature by art. V § 13 to "*regulate by law,*

when necessary, the methods of proceeding in the exercise of their powers of all courts below the Supreme Court . . . ." *ISEEO IV,* 140 Idaho at 593, 97 P.3d at 460 (emphasis in original). The *ISEEO IV* Court concluded that the Legislature's desire "to direct the outcome of a case" seeking to require "the Legislature to fulfill a constitutionally mandated duty" was not "sufficiently necessary so as to justify rewriting the Court's rules of procedure." *Id.* In short, the *ISEEO IV* decision applies only to circumstances where the Legislature asserts authority under art. V § 13 to alter court procedures for the purpose of dismissing a pending lawsuit against the State.

Unlike the legislation at issue in *ISEEO IV,* the Idaho Outdoor Sport Shooting Range Act involves the exercise of the Legislature's police power to regulate the use of state property, and nothing in the Act attempts to regulate the courts in the exercise of their powers. The specific provisions of the Idaho Outdoor Sport Shooting Range Act are well within the Legislature's authorities regarding regulation of noise and activities on state property. "By our Constitution the power to make and determine policy for the government of the State is vested in the Legislature, Idaho Const. Art. 2, § 1, and Art. 3, § 1." *Rich v. Williams*, 81 Idaho 311, 325, 341 P.2d 432, 440 (1959)(citations omitted).

The district court would extend *ISEEO IV*'s application of art. V § 13 to prohibit legislative enactment of substantive regulations in response to a court decision stating its intent to establish such standards judicially as part of an executory order. It has long been established, however, that an executory decree directing the abatement of a nuisance ceases to be enforceable if the underlying laws of nuisance are altered legislatively. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 59 U.S. 421, 431-32 (1855). Such a change in law during the course of an

executory decree does not have the effect and operation of annulling the judgment of the court, since continuing decrees are subject to adjustment in response to changes in circumstances. *Id.*

In *Meyers v. Hansen*, 148 Idaho 283, 290, 221 P.3d 81, 88 (2009), this Court, discussing *Wheeling* and other federal decisions, held that "'[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need,'" including "changes in law or circumstance." *Id.*, *quoting United States v. Swift & Co.*, 286 U.S. 106, 114 (1932). Idaho precedent repeatedly confirms that legislative modification of common or statutory law in response to court holdings does not violate the separation of powers doctrine. E.g., *Moon v. North Idaho Famers Ass'n,* 140 Idaho 536, 545, 96 P.3d 637, 646 (2004), *cert. denied,* 543 U.S. 1146 (2005). When litigation identifies a gap in substantive regulations, it is well within the Legislature's constitutional authority to craft a solution.

Moreover, the district court's reasoning is at odds with precedent establishing that it is improper for the courts to infringe on the Idaho Legislature's exercise of its constitutional police powers. "Just as Article II of the Idaho Constitution prohibits the Legislature from usurping powers properly belonging to the judicial department, so does that provision prohibit the judiciary from improperly invading the province of the Legislature." *ISEEO IV,* 140 Idaho at 597, 97 P.3d at 464 (citation omitted).

In a case involving the Idaho Tort Claims Act, Idaho Code § 6-901 *et seq.*, the Court noted that its role in determining the scope of common law sovereign immunity changed once the Legislature filled a statutory void:

> For the future, our posture is necessarily different. The situation is simply not the same where the legislature has enacted the doctrine of sovereign immunity by statute as it is prior to the time when the legislature has entered the field at all.

Haeg v. City of Pocatello, 98 Idaho 315, 318, 563 P.2d 39, 42 (1977). Thus, in the absence of statutory noise standards, the district court could determine the level at which noises from the Farragut Range constituted a nuisance, but once the Legislature exercised its regulatory police powers to establish noise standards, the court was obligated to apply such standards.

3. The district court erred in determining the Idaho Outdoor Sport Shooting Range Act is an unconstitutional "special law" under art. III § 19 of the Idaho Constitution.

The district court determined that the Idaho Sport Shooting Range Act is "special law" that falls within the enumerated cases prohibited by art. III § 19 of the Idaho Constitution. The district court's analysis is at odds with precedent.

a. Legislative Enactment

The Idaho Outdoor Sport Shooting Range Act was one of two pieces of legislation enacted in 2008 related to sport shooting ranges. Prior to 2008, title 55, chapter 26, Idaho Code addressed both private and public sport shooting ranges. The Idaho Outdoor Sport Shooting Range Act (HB 515) created a new chapter 91 in title 67 (State Government and State Affairs) to address the class of state outdoor sport shooting ranges, excluding totally enclosed facilities, law enforcement, and military ranges. The Act established noise standards and other criteria for state outdoor sport shooting ranges and preempted local regulatory authority over these ranges.

A second piece of legislation (HB 604) added a new section to title 55, Idaho Code § 55-2605, and made other amendments to chapter 26, title 55. HB 604 created a new definition for

outdoor sport shooting ranges, which excluded totally enclosed facilities and state outdoor ranges covered by the Idaho Outdoor Sport Shooting Range Act, and included all other outdoor sport shooting and law enforcement ranges. HB 604 continued to allow county regulation of outdoor sport shooting ranges under title 55, but preempted counties from imposing noise standards more restrictive than those adopted for state outdoor sport shooting ranges in § 67-9102.

Taken together, these two laws subject all current and future outdoor sport shooting ranges in the state to a regulatory noise standard of no lower than a time-weighted metric (leq(h)) of 64 dBA. For state outdoor sport shooting ranges, the Legislature chose to select the most restrictive noise standard it identified for local regulation of other shooting ranges.

b. "Tests" for Special Laws

Neither the noise standard nor the preemption of local authority in the Idaho Outdoor Sport Shooting Range Act falls within the enumerated cases for which art. III § 19 prohibits special laws, and the Idaho Constitution "contains no catch-all restriction against special laws where a general law would apply." *Jones v. State Bd. of Medicine,* 97 Idaho 859, 877, 555 P.2d 399, 417 (1976), *cert. denied,* 431 U.S. 914 (1977). Indeed, there is no constitutional bar to the Legislature's enacting a local or special noise standard.

Although CARE failed to specify which provision of art. III § 19 the Idaho Outdoor Sport Shooting Range Act allegedly violated, the district court presumed CARE intended to refer to the prohibition of "limitation of civil and criminal actions." AR 870. Although CARE's Motion for Summary Judgment focused solely on the status of the noise standards of § 67-9102 as a "special law," the district court engaged in a lengthy analysis of the distinction between the tests

employed for "special laws" and "local laws," and spoke at some length as to the lack of clarity regarding Idaho Supreme Court precedent. *See* AR 872 ("hats off to anyone who can read [a quoted portion of *Moon,* 140 Idaho at 546, 96 P.3d at 647] in one sitting and then articulate the present test for what 'special laws,' the present test for 'local laws,' and what prior appellate precedent is abrogated").

In large part, the district court's decision was based on its determination to resolve a "seeming incongruity" in this Court's decisions establishing the test for identification of special laws, which ultimately led the district court to ask, "so, what is the test for 'special laws'?" AR 874 (emphasis in original). Ultimately, the district court formulated its own definition of "special laws":

> [I]t can be distilled that *the* feature of "special laws" or "special legislation" is: all persons subject to it are not treated alike as to privileges, protection and in every other respect (or, stated differently, *the* feature of "special laws" or "special legislation" is that: the statute does not apply to all persons and subject-matter in like situations) and, the legislation is "capricious, unreasonable or arbitrary" language is added to that test (under *Jones v. Power County* [27 Idaho 656, 150 P. 35 (1915)], as recognized in *Moon*).

AR 875 (underlining in original).

In a surprising analytical turn, however, the district court seemingly ignored its own formulation of the "special laws" test and concluded that the analysis of whether the Idaho Outdoor Sport Shooting Range Act was special legislation was not limited to the terms of the Act but also "encompasses the context in which the Act was discussed before and passed by the Idaho legislature." AR 880. Citing the *ISEEO IV* decision (AR 881), in which this Court cited legislative findings to determine that "the Legislature was in reality enacting special legislation

directed specifically at the *ISEEO* case and particularly, the Plaintiffs and their cause of action against the Legislature," 140 Idaho at 592, 97 P.3d at 459, the district court delved into the legislative history of the Idaho Outdoor Sport Shooting Range Act.

Finding "the Idaho Legislature seems to have learned from its mistake made public in *ISEEO IV* where it advertised its legislative response to a judicial action in the first paragraph of the bill," the district court extended its analysis beyond the text of the statute to committee minutes. AR 882. The district court did not, however, study the legislative history to determine legislative intent; rather, it undertook to compare the factual findings it had previously developed in this case with testimony before the Legislature. AR 882-88. The district court cited testimony of a member of the Fish and Game Commission urging adoption of legislative noise standards for all state-owned sport shooting ranges in response to the controversy surrounding the Farragut Shooting Range. AR 882-84. Ignoring statements and documentation in the court record corroborating the Commissioner's testimony, [1] as well as the fact that IDFG retained the right in legislative proceedings to refer to facts not in the court record and to disagree with the court's factual findings, the district court concluded that the Commissioner's statements to the Legislature were "patently false" and "included a host of inaccuracies." AR 882-84.

Most notably, the district court found the Commissioner's statement that the Commission would like to increase use of the Range to 3,000 shooters per year "takes the cake" because the

[1] *See* AR 691-783, including Affidavits submitted by IDFG in conjunction with the post-judgment summary proceedings, regarding documentation in the record of discovery of some of the range usage records from the 1980s and 1990s; the proximity of some residences to 2 other IDFG shooting ranges in Garden Valley and Blacks Creek; and IDFG's November 2007 decision to not proceed with the Vargas Master Plan and to scale back plans for the Range.

district court had interpreted statements in an earlier IDFG grant application to evidence IDFG's desire to improve the range to handle 46,426 shooters in a month, which the court's findings extrapolated to 557,112 shooters per year. AR 884-85 (citing AR 238, Find. of Fact ¶19). Ignoring the possibility that IDFG both disputed the accuracy of the court's finding and that the Commission had altered its plans for the Range following the conclusion of the litigation, the Court concluded that "IDFG tells the granting authority one thing to get the $3.6 million, and an entirely different thing to the Idaho Legislature in its effort to circumvent this litigation in which it finds itself." AR 885.[2]

The district court's determination that the legislation was an impermissible "special law" was based, in part, on its determination that:

> [T]o the extent the Idaho legislature was given information about House Bill 515, at every juncture it included a reference to this litigation. The information given was at every juncture incomplete (compared to the information given this Court) and at one occasion, the information about the litigation was almost completely false.

AR 887-88. The district court's comparison of testimony provided to the Legislature to the court's previous findings of fact to determine the truthfulness of the legislative testimony is unprecedented, and its employment of such findings to make a determination that the subsequently enacted legislation was a "special law" did not comply with this Court's precedents defining "special legislation."

[2]After the June 2011 evidentiary hearing, however, the district court found that IDFG was in fact "no longer pursuing the Vargas Master Plan for Farragut Range and has scaled back its plans for use of the Farragut Shooting Range," a finding corroborating the very legislative testimony that the district court had found "takes the cake." AR 947, Find. of Fact ¶12.

c. Reasonableness of Legislative Classification

The "general purpose" of art. III § 19's prohibition on specifically enumerated categories of special and local legislation is "to prevent legislation bestowing favors on preferred groups or localities." *Jones*, 97 Idaho at 876, 555 P.2d at 416 (citation omitted). The district court found that the Act "without a doubt" violates the general purpose of art. III § 19 because "on its face" the legislation "only inures to the benefit of the State, and the legislative history shows that it was designed to inure to the benefit only of IDFG and only (or at least primarily) for *this* litigation." AR 888-89 (emphasis in original). Both aspects of this reasoning, however, are unsound.

The Idaho Outdoor Sport Shooting Range Act employs a classification of "state outdoor sport shooting ranges" to which the standards of the Act apply. The district court recognized that the "Act is general in that it applies all over the State of Idaho, but the Act has a 'local application' to only possibly four ranges (three of which are in uninhabited areas) and it does not 'operate equally upon all subjects for which the rule is adopted' if 'subjects' are citizens of Idaho." AR 896. In essence, the district court ignored the classification applied by the Legislature, and crafted its own classification, finding that "this Act applies only to these citizens around the Farragut range." *Id.*

The district court's decision ignores the fundamental principle that "[w]hether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, 'not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is

affected by the laws.'" AR 895, citing *Mix v. Bd. of Commr's of Nez Perce County*, 18 Idaho 695, 706, 112 P. 215, 218-219 (1910). The fact that the State owns a limited number of sport shooting ranges is irrelevant to the determination of whether it was reasonable for the Idaho Legislature to conclude that the state's legitimate government interest in providing shooting facilities for improvement of firearm skills, mandatory hunter education, recreational and other purposes should not be frustrated by local regulations. There is no minimum acreage requirement in the Idaho Constitution for establishment of statutory standards for use of state property. Moreover, the noise standards apply not only to existing state sport shooting ranges, but to any future ranges the state may acquire.

In short, the district court failed to acknowledge the Legislature's authority to adopt regulations specific to a certain class of state property even if the properties subject to the classification are limited in number. Such legislation can constitute a general law, even if the state is treated differently than its local or private counterparts. There are many unique interests, duties, and characteristics inherent to sovereign governmental functions, as well as proprietary functions performed on the public's behalf. Any of these interests may make it "reasonable" for the Legislature to employ classifications based on the distinctions between governmental and private entities and governmental and private property. For example, the Legislature determined that the subject matter of state-owned buildings is completely covered by general law and may not be subjected to an ordinance that is purely local in nature. *Caesar v. State,* 101 Idaho 158, 610 P.2d 517 (1980).

d. The district court erred in substituting its judgment for that of the Legislature on factual issues in determining that the legislation was arbitrary, capricious and unreasonable.

The *ISEEO IV* decision determined that "[for legislation] to be characterized as a general law, it must be for a legitimate legislative interest and cannot be arbitrary, capricious, or unreasonable." *ISEEO IV*, 140 Idaho at 591, 97 P.3d at 458; *see* AR 879. The district court concluded that the Idaho Outdoor Sport Shooting Range Act violated the "arbitrary, capricious, and unreasonable" prong of this Court's "special law" analysis because:

> [T]he Idaho Legislature passed a law regarding noise limitations, and in doing so: a) did not ask for any scientific information, b) accepted information which is incomplete and at times false and c) either failed to realize (best case) or ignored the fact (worst case) that what they were being asked to do was in direct response to litigation . . . .

AR 899; *see also* AR 886 ("the legislation itself incorporates a [noise] metric that this Court found flawed").

The district court's willingness to substitute its judgment regarding the veracity of facts presented to the Legislature violates a fundamental precept of judicial review:

> Where a statute, ordinance or regulation presents a proper field for the exercise of the police power, the extent of its invocation and application is a matter which lies very largely in the legislative discretion, and every presumption is to be indulged in favor of the exercise of that discretion, unless arbitrary action is clearly disclosed. The subject matter of the ordinance being within the police power, and properly belonging to the legislative department of government, the courts will not interfere with the discretion, nor inquire into the motive or wisdom of the legislature. If the act is not clearly unreasonable, capricious, arbitrary or discriminatory, it will be upheld as a proper exercise of the police power.
>
> The courts may differ with the legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which have justified the regulation, it

> must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. When the necessity or propriety of an enactment is a question upon which reasonable minds might differ, the propriety and necessity of such enactment is a matter of legislative determination.

Dry Creek Partners, LLC, v. Ada County Comm'rs, 148 Idaho 11, 19, 217 P.3d 1282, 1290 (2009), quoting *State v. Clark*, 88 Idaho 365, 375-76, 399 P.2d 955, 961 (1965); *see also V-1 Oil Co. v. Idaho State Tax Comm'n,* 134 Idaho 716, 720, 9 P.3d 519, 523 (2000) ("a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data"), *quoting F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Ransom v. City of Garden City*, 113 Idaho 202, 205, 743 P.2d 70, 73 (1987) ("In addition, courts must not intrude into realms of policy exceeding their institutional competence. The judicial branch lacks the fact-finding ability of the legislature, and the special expertise of the executive departments . . . . [Courts] should not attempt to balance the detailed and competing elements of legislative or executive decisions"), *quoting Industrial Indem. Co. v. State,* 669 P.2d 561, 563 (Alaska 1983).

The district court's holding is at odds with this broad array of precedents recognizing that the courts may not countermand the Legislature's authority to engage in fact-finding and to balance competing facts and interests. It is within the Legislature's police powers to balance the state's legitimate government interest in the reasonable use and regulation of state property for shooting ranges for safety instruction and recreational purposes with the interests of persons that may be impacted by noise associated with such activities.

The Idaho Outdoor Sport Shooting Range Act specifies a legislative finding "that state outdoor sport shooting ranges should be subject to uniform noise standards . . . ." Idaho Code § 67-9102(2). To accomplish this, the Legislature adopted noise standards from Arizona statutes that fall within a range of generally accepted noise regulation principles. *See* Ariz. Rev. Stat. § 17-602 (including a legislative finding that "outdoor shooting range noise standards are a matter of statewide concern"). It was well within the Legislature's authority to adopt legislation from a sister state without conducting its own independent scientific inquiry into the factual basis of the standard.[3]

Nonetheless, the district court ostensibly applied the second "arbitrary," "capricious," or "unreasonable" test to the law as a whole to justify greatly expanding the level of review by which courts traditionally evaluate the merits of legislative actions. By concluding the noise standard to be arbitrary, because it was established with "little or no scientific input" (AR 901) and employed a noise measurement methodology that the court "found flawed" (AR 886), the district court upset the established burden for determining the constitutionality of statutes. Instead of "every presumption [being made] in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality rest[ing] upon the challenger," *ISEEO IV*, 140 Idaho at 590, 97 P.3d at 457 (citation omitted), the district court would require the Legislature to

[3] In addition to the two pieces of legislation regarding outdoor sport shooting ranges, a third piece of legislation enacted in 2008, SB 1441, preempted local authorities from adopting ordinances regulating, restricting or prohibiting discharges of firearms, including those: in lawful self-defense and hunting; by private landowners; from title 55 sport shooting ranges (with local authority preempted at state sport shooting ranges under Title 67); and in the course of target shooting on public land if the discharge will not endanger persons or property. Idaho Code § 18-3302J. This legislation found "that uniform laws regulating firearms are necessary to protect the individual citizen's right to bear arms guaranteed" by the U.S. and Idaho Constitutions. *Id.*

demonstrate judicial-style fact-finding before enactment of legislation. Important public policy considerations should be weighed before courts impose upon the Idaho Legislature the same principles that support judicial economy, finality, and efficiency.

In addition to its effect on the Farragut and other IDFG ranges, the district court's determination that Idaho Code § 67-9101 *et seq.* are unconstitutional also effectively invalidates portions of Idaho Code § 55-2605 that prohibit local governments from establishing noise standards for outdoor sport shooting ranges more restrictive than the standards in § 67-9102.

The Idaho Outdoor Sport Shooting Range Act does not violate the Idaho Constitution's prohibition on certain classes of "special" legislation, and is well within the constitutional powers of the Idaho Legislature.

B. The district court erred in interpreting the Judgment's conditions for reopening the Range for up to 500 shooters.

1. Standard of Review

Rule 65(d) of the Idaho Rules of Civil Procedure requires that any "order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ." I.R.C.P. 65(d). Thus, Rule 65 constrains whatever discretion district courts may generally have, as the draftsmen of their decisions and orders,[4] to interpret the meaning of such orders. In

[4]Reviewing courts in other jurisdictions have generally given deference to a district court's interpretation as the draftsman of its own order. *See, e.g., Garcia v. Yonkers School Dist.*, 561 F.3d 97, 103 (2nd Cir. 2009); *Fredericksburg Construction v. J.W. Wyne Excavating*, 260 Va. 137, 530 S.E.2d 148 (2000). Reviewing courts have not, however, given equal deference to every aspect of a court's interpretation of its own order. "The abuse of discretion standard is used to evaluate the ... court's application of the facts to the appropriate legal standard, and the factual findings and legal conclusions underlying such decisions are evaluated under the clearly erroneous and *de*

interpreting the scope of an injunction, a district court is prohibited from interpreting its orders to enjoin actions not specifically described in reasonable detail in the terms of the injunction.

> In the absence of Idaho case law on the subject of specificity under Rule 65(d), case law on the corresponding federal rule is pertinent.
>
> > [Federal] Rule 65 serves to protect those who are enjoined []by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order.... The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.
>
> 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2955 (1995), quoted in *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1531, *reh'g denied*, 89 F.3d 857 (11th Cir.), *cert. denied*, 519 U.S. 993 (1996). Rule 65 (d) "is satisfied only if the enjoined party can ascertain from the four corners of the order precisely what acts are forbidden or required." *Petrello v. White*, 533 F.3d 110, 114 (2nd Cir. 2008)(citations omitted), *affirmed*, 344 Fed. Appx. 651 (2nd Cir. 2009)(unpublished, No. 09-0343-CV).

AR 954-55, Concl. of Law ¶6.

In cases involving contempt sanctions, courts have construed injunctions narrowly where they fail to give adequate notice of prohibited or mandated conduct. *See Abbott Labs. v. TorPharm, Inc.*, 503 F.3d 1372, 1382-3 (Fed. Cir. 2007), *cert. denied,* 553 U.S. 1031 (2008), *quoting Ford v. Kammerer,* 450 F.2d 279, 280 (3d Cir. 1971) ("[Injunctions] are binding only to the extent they contain sufficient description of the prohibited or mandated acts . . . .

---

novo standards, respect[ively]." *Garcia v. Yonkers School Dist.*, 561 F.3d at 103, *quoting Matter of VMS Sec. Litig.*, 103 F.3d 1317, 1323 (7th Cir.1996); *see also In re Airadigm Communications, Inc.*, 616 F.3d 642, 651 (7th Cir. 2010), quoting *Corporate Assets, Inc. v. Paloian,* 368 F.3d 761, 767 (7th Cir. 2004)(concluding a court abuses its discretion "when its decision is premised on an incorrect legal principle or a clearly erroneous factual finding, or when the record contains no evidence on which the court rationally could have relied"); *In re Tomlin,* 105 F.3d 933, 940 (4th Cir.1997)(concluding a reviewing court "may resort to the record upon which the judgment was based" to construe a lower court's order)(quotation omitted).

[A]mbiguities and omissions in orders redound to the benefit of the person charged with contempt.") and 11A Wright & Miller, Federal Practice & Procedure § 2955 ("Since . . . only those acts specified by the order will be treated as within its scope and . . . no conduct or action will be prohibited by implication, all omissions or ambiguities . . . will be resolved in favor of [the enjoined party].").

In applying Fed. R. Civ .P. 65(d) , the federal rule corresponding to I.R.C.P. 65(d) , a reviewing court concluded "[a]n injunction does not prohibit those acts that are not within its terms as reasonably construed." *Alabama Nursing Home Ass'n v. Harris,* 617 F.2d 385, 387-88 (5th Cir. 1980)(citation omitted). "In determining whether a particular act falls within the scope of an injunction's prohibition, particular emphasis must be given to the express terms of the order." *Id.*

In short, the standards of I.R.C.P. 65(d), as well as the due process and equitable principles it embodies, support narrow interpretations of both the enjoined activity and any conditions established for lifting the injunction. The means to obtain freedom from a court's contempt powers should be as readily understood as the actions subjecting a party to them.

2. The district court's interpretation of its condition to reopen the Range for up to 500 shooters is at odds with the requirements of Rule 65(d).

In its Judgment, the district court indicated the conditions for reopening the Range for up to 500 shooters and the manner in which it would approve the reopening of the Range:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that [IDFG is] directed and enjoined to close the Farragut Wildlife Management Area to all persons using pistols, rifles, and firearms using or intending to use live ammunition until a baffle is installed over every firing position. As set forth in

the Order entered February 23, 2007, all shooting ranges shall remain closed until the following condition is met regarding the installation of each baffle:

> The baffle must be placed and be of sufficient size that the shooter, in any position (standing, kneeling, prone) cannot fire his or her weapon above the berm behind the target. Either the parties shall agree that the baffles have been adequately installed or that issue shall be submitted for view of the premises by the Court.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that at such time as baffles are installed over every firing position and approved in the manner set forth, [IDFG] may operate the Farragut Shooting Range in the same manner in which it historically has (i.e., without any on site supervision), for up to 500 shooters per year.

AR 281-282.

Based on CARE's conceding the fact in its pre-trial memorandum, as well as evidence presented at the hearing, the district court found "[t]he baffles at the 100-yard shooting area are sufficient to prevent shooters from 'directly' firing above the berm behind the target from any of the 12 shooting positions (from prone to standing)." AR 949, Find. of Fact ¶23. Nonetheless, the district court denied IDFG's June 9, 2010 Motion to Partially Lift Injunction[5] and concluded as a matter of law:

> Simply because IDFG has installed at least one baffle over all 12 designated shooting positions at the 100-yard shooting area, and such baffles are placed and of sufficient size that a shooter in any positions (standing, kneeling, prone) cannot fire his or her weapon above the berm behind the target at the 100-yard shooting area does not mean IDFG has complied with the Court's 2007 condition to lift its 2007 injunction for these 12 designated shooting positions, for up to 500 shooters per year.

AR 955-56, Concl. of Law ¶6.

[5] The district court also denied a motion IDFG made at the beginning of the June 2011 evidentiary hearing to partially lift the injunction based on CARE's concession in its pre-trial memo regarding the adequacy of baffle installation. TR141-44.

> [I]t does not violate I.R.C.P. 65(d) to interpret the plain language and context of the Court's 2007 Order condition for up to 500 shooters (the installation of a baffle over every shooting position to prevent a shooter from firing over the berm behind the target), to encompass shooters firing at, below, or in directions to the side of or away from the berm behind the target.

Id.

To reach these counterintuitive conclusions, the district court did not modify the Judgment establishing the conditions for re-opening the Range. Instead, it found that the term "round," which does not appear in the terms of the Judgment,[6] included "ricochets," an issue not emphasized at the original trial, but raised by CARE in the post-judgment proceedings. AR 955. This legal conclusion interpreting the terms of the district court's prior orders is unreasonable, regardless of whether this Court employs *de novo* review or an abuse of discretion standard. Interpreting the injunction's condition to prohibit firing a weapon that may result in escapement of ricochets despite the lack of any such prohibition on the face of the injunction violates the requirements of Rule 65.

Notably, the district court recognized that IDFG's interpretation of the injunction to only require construction of baffles that prevent the direct fire of bullets beyond the confines of the range was not without reason. In denying CARE's application for costs and attorneys' fees, the district court determined "it cannot be said that IDFG acted without a reasonable basis in fact or law in bringing an arguably legitimate dispute as to how to interpret that 2007 Order." AR 982. The district court also found:

[6] The word "round" appears only in the conditions set forth in the district court's February 23, 2007 Memorandum Decision and Order for lifting the injunction to allow up to 500 shooters per year, if "plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target." AR 278.

> The Court in 2007 did not specify that safety improvements had to include addressing ricochets, but that is because the topic of ricochets was not directly raised in 2007. What was discussed was safety and noise, and safety includes ricochets. While it seems odd for IDFG to ignore the issue of ricochets, it is understandable that IDFG would focus on live rounds escaping the range, given that the focus at the 2006 proceeding on safety concerns was the "no blue sky" concept, which addressed only direct shots at the target. Since that was *the focus by the parties* of the 2006 proceeding, it was the focus of this Court's February 23, 2007, decision.

AR 983 (emphasis in original).[7]

> In its motion to partially lift the injunction, IDFG overlooked the issue of ricochets. Ricochets were not *explicitly* discussed in 2007. However, ricochets were certainly *implicitly* discussed in 2007 when the Court mentioned bullet "containment[.]" This Court wrote:
>
> > The first concern (safety) can be satisfied only by the "No Blue Sky" rule, or "totally baffled ... so that a round cannot escape", as espoused by the nation's preeminent authority on range design and designer of the Vargas Master Plan, Clark Vargas. Exhibit 2, p. 5. Once bullet containment is achieved, it matters not for purposes of this litigation if the range is supervised (with bullet containment, supervision would only inure to the benefit of the participants, an important consideration, but not the subject of this lawsuit).
>
> February 23, 2007, Memorandum Decision, Findings of Fact, Conclusions of Law and Order, pp. 61-62.
>
> Simply because IDFG ignored the issue of bullet containment[8] and ignored the practical fact that ricochets are bullets too, does not equate to IDFG acting without a reasonable basis in fact or in law. This is a complex case spanning several years. The fact is the parties did not initially (in 2006) directly discuss ricochets, and initially (in 2007), the Court did not discuss ricochets. But the fact that what

[7] The district court indicated a review of its notes from the 4-day 2006 trial showed "'ricochet' was only mentioned once, in passing, by [CARE's] expert Roy Ruel, when he mentioned a ricochet can occur off the ground or floor of the range." AR 941. The only testimony discussed in the 2007 Memorandum Decision in detail as to how bullets might escape was that of Mr. Ruel, whose testimony clearly focused on firing directly over the back berm. *See* AR 246; *see also* Exh. 33, 34.

[8] The district court limited the June 2011 hearing to evidence on the standard for up to 500 shooters (AR 953, Concl. of Law ¶1). The standard the district court refers to here relates to bullet containment for more than 500 shooters, and was not before the court in the June 2011 hearing or related briefing.

> appears to be an obvious issue (ricochets) was initially overlooked by the attorneys for each side and the one judge who was assigned the task of trying to resolve this complex litigation, underscores the need for a collaborative approach in the future. If all the stakeholders involved in this litigation worked together, the odds of overlooking an important issue are greatly reduced.

AR 985-86; *see also* TR 141-42 ("The opinion does I think lend itself to an interpretation that as long as direct fire's been addressed, then the injunction should be relieved, at least as to this particular shooting position, but ... I think it would be naïve to limit – to have the language of the decision limited only to direct fire . . . .").

In explaining why IDFG's position was not without reason, the district court exposes the unreasonableness of its own interpretation. The district court confirmed that ricochets were not addressed in the four corners of the 2007 Memorandum Decision and Order or the 2007 Judgment. In fact, the district court concedes the "topic" of ricochets was never directly discussed by the parties or the court during the course of litigation.[9]

The district court's discussion also indicates the court has confused the two standards it applied to lifting injunctive relief, one standard to allow reopening the range for up to 500 shooters per year and a more stringent standard to exceed 500 shooters per year. The 2007 Judgment set the following standard for reopening the Range to more than 500 shooters:

[9] As discussed in footnote 4, *supra,* reviewing courts in other jurisdictions have considered support in the record a factor in determining whether a lower court abused its discretion in interpreting an order.

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual use level shall not exceed 500 shooters per year until and unless [IDFG] has constructed and installed safety measures adequate to prevent bullet escapement beyond the boundaries owned and controlled by [IDFG] and constructed and installed noise abatement measures to reduce noise to a decibel level agreed upon by the parties in the first instance, or, if the parties are unable to agree, to be set by the Court following further evidence. Such further use shall only be commenced upon Order of this Court following hearing establishing that the safety and noise concerns have been eliminated in the manner satisfactory to the Court based upon its Findings of Fact, Conclusions of Law and Order.

AR 282.

As noted *supra,* the district court referred to the language of this more stringent requirement to explain how ricochets were "implicitly" addressed in its Order. The 2007 Judgment and Memorandum Decision and Order contained no such references in the requirement for opening the Range for up to 500 shooters. The district court also acknowledged that the "No Blue Sky Rule," one of the only two methods the court allowed for complying with its *stricter* standard for opening the range to more than 500 shooters, "addressed only direct shots at the target ...." AR 983. Thus, interpreting the lesser safety standard (for up to 500 shooters) to encompass more than direct fire is inherently unreasonable.

In addition, the district court's interpretation ignores the fact that the 2007 Judgment specified a particular physical feature--a safety baffle placed "over" each shooting position--to address its safety concerns for up to 500 shooters. AR 281; *see also* AR 278. The features of ground baffles, eyebrow berms, and bullet catchers are distinct from overhead baffles and were before the district court in 2007. *See, e.g.,* AR 945-46 (discussing CARE's 2006 Trial Exh. 6 at 5, Exh. 2 at 16); Exh. 38. Yet, the district court did not reference ground baffles, eyebrow berms

or bullet catchers in the conditions for lifting the injunction in 2007 for up to 500 shooters. Nor are they required to meet even the more stringent "No Blue Sky Rule" standard for more than 500 shooters, as a shooter can have a "No Blue Sky" downrange view without them. *See* Exh. PPP. Interpretation of the Judgment to incorporate these additional features to open the Range for up to 500 shooters is unreasonable.

As a matter of law, the Judgment did not require IDFG to make modifications necessary to prevent escapement of ricochets over the back berm[10] to open the Range to up to 500 shooters, even when interpreted with reference to the entire record before the district court. Alternatively, the district court abused its discretion by interpreting its Judgment to require actions to prevent escapement of ricochets when the court itself acknowledges a lack of support in the record for such an interpretation.

3. In its 2007 Order and Judgment, the district court clearly contemplated its standard to open the range for up to 500 shooters could be measured by a layperson's visual inspection.

On its face, the Judgment did not contemplate additional argument over what features might be needed to open the Range for up to 500 shooters. The Judgment indicated that compliance with the requirement to install baffles over firing positions could be determined by visual inspection by a layperson in the form of the district court.[11]

---

[10] There is an additional safety area behind the back berm (*see* AR 694, ¶15) within the "boundaries owned and controlled by IDFG," the subject of the district court's more stringent escapement standard for opening the range to more than 500 shooters per year (AR 282).

[11] In addition to referencing the approval by court view in its Motion to Partially Lift Injunction (AR 295), IDFG subsequently made a Motion for Court View (AR 808-809) to ensure a clear record of its compliance with the mandate of the 2007 Judgment ("that issue shall be submitted for view of the premises by the Court"). *See* AR 281.

> Either the parties shall agree that the baffles have been adequately installed or that issue shall be submitted for view of the premises by the Court.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that at such time as baffles are installed over every firing position and approved in the manner set forth, IDFG may operate the Farragut Shooting Range in the same manner in which it historically has (i.e., without any on site supervision), for up to 500 shooters per year.

AR 281. Similar language was contained in the February 23, 2007 Order:

> Once baffles are installed and either 1) plaintiffs agree that the shooter in any position cannot fire a round above the berm behind the target, or 2) if the plaintiffs cannot agree, the Court so finds after a view of the premises, the injunction will be lifted, and IDF&G may operate that range in the same manner in which it historically has (ie., without any on site supervision), up to 500 shooters per year....

AR 278.

At the August 2011 status conference, however, the district court reinterpreted the manner in which it would approve the reopening of the Range for up to 500 shooters:

> I didn't say in my order that if the parties can't agree, the Court would conduct a view and not listen to opposing viewpoints, so I need to get this controversy before me, and ... the most appropriate way to do that is with a summary judgment motion.

TR 24-25.

> [T]hat doesn't mean that it's simply going to be the Department submitting what it wants, the Court taking a view and calling it good.... so we'll proceed under our rules of summary judgment, the parties address those issues as far as discovery cutoffs, expert disclosures, and the time for the hearing on summary judgment ....

TR 32-33.

Citing a withdrawn opinion of the Court criticizing this particular district court for its use of court views, the district court *sua sponte* modified its 2007 Order and Judgment to require an evidentiary hearing for reopening the Range for up to 500 shooters. AR 856-59; *see also* TR 45-

52. Instead of satisfying the concern for establishing a record for a reviewing court by requiring photographic or videographic evidence, which IDFG and CARE provided to the district court (*see, e.g.,* Exh. PPP), the district court converted the case into an "expert intensive" one. *See* AR 859; TR 52, l. 11-13. In doing so, the district court allowed CARE to retry key portions of their case outside the procedural requirements of the Rule 60(b) and to influence the district court's interpretation of its Order and Judgment with the introduction of "requirements" not referenced or relied upon in the pre-Judgment proceedings.

4. The district court's interpretation is at odds with the parties' burdens for injunctive and post-judgment relief.

IDFG has the burden of demonstrating it has met the conditions for lifting the injunction. Consistent with Rule 65(d), Rule 60(b) and the principles of due process and equitable relief (*see* AR 954, ¶¶5-6), however, it cannot conceivably be IDFG's burden to guess what "problems" CARE and the district court might have "overlooked" in the pre-Judgment proceedings.

CARE had more than a year to develop its case regarding Range safety issues, with full discovery, its summary judgment motion, and a 4-day trial in December 2006. In pre-Judgment proceedings, CARE offered expert testimony on range safety considerations and presented an array of exhibits regarding range design from the National Rifle Association, National Shooting Sports Foundation, U.S. military, and other sources. *E.g.,* Court Exh. 4, CARE Exh. 2-6, 18-19, 32-34, 38, 43. In its post-trial brief in 2006, CARE advocated for permanent closure of the Range, or alternatively that the Range meet the "No Blue Sky" Rule. AR 215-17.

The district court recognized the challenge of standards in its Memorandum Decision and Order following summary judgment proceedings in 2006. *See* AR 91-93. Referencing local, military, and NRA safety guidelines, the court concluded "this trial may primarily be a trial of experts as to not only what standard(s) are most appropriate, but what portions of the most applicable standard(s) do and do not apply." AR 93. Following the 2006 trial, the district court determined what portions of the most applicable standards should apply to the Range. The court did not apply or reference either military guidelines or the NRA Source Book in its Judgment or underlying Order. AR 281-2; AR 278-79. Instead, the district court chose to invoke the CARE-advocated requirement of the "No Blue Sky Rule" or an alternative requirement based on a document by Clark Vargas (distinct from than the NRA Source Book) for its more stringent standard to open the Range to more than 500 shooters per year. *See id.* To allow reopening of the Range for up to 500 shooters, the district court fashioned a lesser standard to install a baffle over each shooting position to prevent fire above the back berm. *See id.*

IDFG reasonably installed baffles to prevent shooters from firing above the berm behind the target and compiled evidence to demonstrate compliance with this condition. In the post-Judgment proceedings, however, over IDFG's objections and related motions (*e.g.,* AR 951, Find. of Fact ¶35; TR 135-37, 141-46, 491-96), the district court erred in allowing CARE to essentially retry its principal case as to applicable safety features, ostensibly to help the court "interpret" the injunction's requirement for installation of a baffle over every shooting position to address the "problem of ricochets" that had been "overlooked" in the pre-judgment proceedings. AR 942-46, 955-957, 983, 986; TR 142, l. 9-17.

At CARE's urging, the district court interpreted its stated safety requirement to reopen the range for up to 500 shooters to incorporate two additional, unstated safety features: ground baffles and an eyebrow berm or bullet catcher, which had been referenced in some of CARE's 2006 Trial exhibits. AR 956-57, Concl. of Law ¶¶9, 12; *see also* 945-946 (regarding Exh. 6 and Exh. 2 references to ground baffles and eyebrow ricochet catcher). Similarly, the district court erred by allowing CARE, in post-judgment proceedings, to present U.S. Air Force guidelines and conventions that had not been presented in the 2006 trial, through the testimony of a retired Air Force engineer. Because the district court allowed this information to influence its expansion of the Judgment well beyond its express terms, this error was not harmless. For example, the district court compared IDFG's safety improvements to Air Force Engineering Technical Letters (ETL) and other guidelines not relied upon in framing the 2007 injunction. AR 957, Concl. Of Law ¶10 (the range "was not designed and constructed by IDFG to meet the professional standards set forth by Clark Vargas in the National Rifle Association Range Source Book (1999 version) and the ETL"); *see also* AR 945; 951-52, Find. of Fact ¶¶36, 42, 43.

Where CARE sought to raise new issues post-judgment or revisit information previously provided to the court but not referenced in its injunction, the district court should have required CARE to comply with I.R.C.P. 60(b). *See State v. Hartwig*, 150 Idaho 326, 329, 246 P.3d 979, 982 (2011)(citation omitted). To rely on Rule 60(b)(5), for example, a movant must show "(1) that the judgment is prospective in nature; and (2) that it is no longer equitable to enforce the judgment as written." *Rudd v. Rudd,* 105 Idaho 112, 118-119, 666 P.2d 639, 645-646 (1983) ("a

movant must also show a sufficient change of circumstances rendering enforcement of the judgment inequitable").

Not only did the district court allow CARE to retry its original case, it allowed CARE to do so free of the burden that properly belongs to CARE for post-judgment relief under I.R.C.P. 60(b). Indeed, the district court did not even require CARE to meet the burden it recognized CARE bore in the original nuisance action:

> In order to obtain an injunction against, or the abatement of, an alleged nuisance, the complaining party must show a *clear case* supporting his right to relief. *Larsen v. Village of Lava Hot Springs,* 88 Idaho 64, 73, 396 P.2d 471 (1964) (emphasis added). A showing that there is a possibility of injury will not sustain the injunctive relief sought. *Id.*

AR 89.

> For the purpose of fashioning equitable relief in a nuisance case, "[t]he restraint imposed by an injunction should not be more extensive than is reasonably required to protect the interests of the party in whose favor it is granted, and should not be so broad as to prevent defendant from exercising its rights ...." *Kolstad v. Rankin,* 179 Ill. App. 3d 1022, 1034, 534 N.E. 2d 1373, 1381 (Ill Appl. 1989).

AR 954, Concl. of Law ¶5; *see also* AR 263, Concl. Of Law ¶5.

Instead of CARE's being responsible for meeting these burdens, the district court placed the burden on IDFG to explain why the court should not consider an issue the parties did not discuss at the underlying trial--the issue of ricochets--and placed the burden on IDFG to address the issue in regards to IDFG's compliance with the 2007 Judgment:

> While ricochets were not discussed in 2006, IDFG has not made any cogent argument as to why the problem of ricochets should *not* be considered by this Court relative to IDFG's motion to partially lift the injunction.

AR 956, Concl. of Law ¶6 (emphasis in original).

The district court's method of determining compliance with the terms of its injunction creates the proverbial moving target and leaves IDFG to guess what "implied" or "overlooked" problems it must address in the future.[12] The district court's approach is at odds with procedural rule requirements and the principles of due process and equity.

IV. CONCLUSION

IDFG requests the following relief:

- That the Court conclude as a matter of law that IDFG has met the 2007 Judgment's condition to reopen the 100-yard shooting area for up to 500 shooters per year, given the district court's Finding of Fact (AR 949 ¶23) (per CARE's agreement and as otherwise evidenced by the record), that IDFG has installed baffles over each of the 12 shooting positions in the 100-yard shooting area sufficient to prevent shooters (from prone to standing) from firing above the berm behind the target; and that the Court remand the proceedings to the district court to partially lift the injunction to reopen the 100-yard shooting area at Farragut Range for up to 500 shooters per year consistent with this conclusion;

[12] In fact, it remains unclear from the district court's latest interpretation what *will* satisfy the court to lift the injunction for up to 500 shooters. The district court only indicates partial lifting "*should*" occur with the addition of ground baffles in conjunction with overhead baffles and an eyebrow berm or bullet catcher, not that it "will" or "shall." AR 957, Concl. Of Law ¶12; *see also* Concl. Of Law ¶9 at AR 956-957. The district court has also signaled its willingness to make future *sua sponte* modifications to the 2007 Judgment. *See* AR 950, Find. of Fact ¶¶ 27, 28, (finding that standard operating procedures for the Range drafted by IDFG and the Idaho Department of Parks and Recreation "will need to be made a requirement in a future court order, and will need to be made part of a judgment, so that IDFG does not unilaterally change these procedures in the future, after this litigation has concluded").

- That the Court reverse the district court's decision regarding the constitutionality of the Idaho Outdoor Sport Shooting Range Act and conclude as a matter of law that the Idaho Outdoor Sport Shooting Range Act is constitutional and applicable to the Farragut Shooting Range; and
- That the Court remand the proceedings to the district court to determine IDFG's compliance with the conditions to reopen the Range for more than 500 shooters, by compliance with the "No Blue Sky Rule" or, alternatively, the criteria espoused by Clark Vargas, as stated in the district court's 2007 Memorandum Decision and Order in support of the 2007 Judgment.

DATED this 6th day of March 2012.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

Kathleen E. Trever

KATHLEEN E. TREVER
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that on the 6th day of March 2012, I caused to be served two copies of the APPELLANTS' BRIEF on each of the following persons by U.S. Mail, postage prepaid and addressed as follows:

SCOTT W. REED
ATTORNEY AT LAW
P.O. BOX A
COEUR D'ALENE, ID 83816

HARVEY RICHMAN
ATTORNEY AT LAW
19643 N. PERIMETER ROAD
AHOL, ID 83801

Kathleen E. Trever

KATHLEEN E. TREVER
Deputy Attorney General